Supreme Court, U.S.
FILED

10-340 JUL 30 2010

No. OFFICE OF THE CLERK

In The

Supreme Court Of The United States

BRUCE A. JACKIM,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for a Writ of Certiorari
to the Ohio Supreme Court

SUPPLEMENTAL APPENDIX

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COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT

COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION

No. 92617

STATE OF OHIO

PLAINTIFF-APPELLEE

vs

BRUCE JACKIM

DEFENDANT-APPELLANT

JUDGEMENT:

AFFIRMED

Criminal Appeal from the

Cuyahoga County Court of Common Pleas

Case No. CR-439646

BEFORE: Jones, J., Cooney, A.J., and Kilbane, J.

RELEASED: December 17, 2009

JOURNALIZED: January 08, 2010

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R.22. This decision will be journalized and will become judgment and order of the court pursuant to App.R. 22(C) unless a motion for consideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio

shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

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LARRY A. JONES, J.:

Defendant-appellant, Bruce Jackim ("Jackim"), appeals his conviction for assault on a police officer and resisting arrest.

On appeal, Jackim asserts the following assignments of error:

"I. The trial court committed plain error when it failed to properly instruct the jury, there was insufficient evidence to support Jackim's convictions, and the convictions were against the manifest weight of the evidence

"II. The trial court committed plain error by allowing the state to proceed with a defective indictment.

"III. The trial court committed plain error by failing to grant Jackim's motion to dismiss based on a violation of his right to a speedy trial.

"IV. The trial court committed plain error in excluding expert reports and testimony as to the expert's findings and ultimate issue of fact.

"V. The trial court committed plain error in misapplying the hearsay rule by excluding testimony of defense witnesses."

Finding no merit to the appeal, we affirm.

In 2003, Jackim was charged with felonious assault of a police officer, assault of a police officer, and resisting arrest. Before trial, Jackim moved to dismiss the indictment, arguing a violation of his right to a speedy trial. The matter proceeded to a trial before a jury, and Jackim was convicted of one count of assault of a police officer and one count of resisting arrest. The court sentenced him to a six-month suspended jail sentence and one year of community control sanctions. Jackim appealed, claiming error in the trial court's denial of his

motion for acquittal, the court's failure to enforce subpoenas to material witnesses, suppression of a videotape and denial of his motion for a new trial. *State v. Jackim,* Cuyahoga App.Nos. 87012 and 87400, 2006-Ohio-4756 ("Jackim I"). We reversed his conviction, finding that the trial court had erred in granting a motion in limine excluding the surveillance videotape as well as reference to it at trial. *Jackim I.* We remanded the case for a new trial and ruled that Jackim's other claims were moot because of this court's ruling. Id. at ¶21.

On remand, Jackim filed another motion to dismiss the case based upon an alleged violation of his right to a speedy trial. The court again denied his motion. In December 2007, Jackim filed a petition with this court for a writ of prohibition to prevent the trial court from proceeding with Jackim's retrial because of the claimed speedy trial violation. We dismissed his claim sua sponte for failure to state a claim upon which prohibition

would issue. *State ex rel. Jackim v. Ambrose*, Cuyahoga App. No. 90785, 2008-Ohio-45, affirmed by, *State ex rel. Jackim v Ambrose*, 118 Ohio St.3rd 512, 2008-Ohio-3182, 890 N.E.2d 324.[1]

Prior to the beginning of the second trial, the trial court amended the indictment to reflect the verdict previously rendered by the jury in the first trial; the indictment was amended to one count of assault on a peace officer

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specification and one count of resisting arrest. The matter then proceeded to a second trial by jury. The following evidence was adduced at trial.

In May 2003, Jackim and his wife, Nina Jackim, were shopping at Sam's Club in Brooklyn, Ohio. After the cashier finished processing their order, Jackim noticed that the tax-exempt status of his business account was not appearing on the receipt and he had been charged sales tax on his purchase. The cashier called her supervisor for assistance. The supervisor escorted the Jackims to the customer service counter and referred the couple to a customer service clerk. The clerk checked the account status and did not find any proof of the couple's tax-exempt status. Jackim became upset, and the clerk contacted her store manager. The manager was unable to immediately assist the Jackims because she was with another

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[1] Jackim's counsel has filed on his behalf, and personally, numerous writs in both state and federal court regarding this case. All writs have either been sua sponte dismissed or denied.

customer. Jackim became upset and began to complain loudly.

Dan Meadows, a uniformed Brooklyn police officer who was working at Sam's Club, approached Jackim. Officer Meadows asked Jackim several times to calm down and twice asked for his identification. The acts that followed are disputed; however, the testimony shows that Jackim and Officer Meadows engaged in an altercation and the two men fell to the ground. Officer Meadows attempted to handcuff Jackim, who resisted. Meadows used his police-issued pepper spray on Jackim, who bit Meadow's arm. Two other police officers and

a store employee assisted Meadows in his attempts to subdue and restrain Jackim. Eyewitnesses to the incident testified that Officer Meadow's arm was bleeding; these same witnesses heard the officer say that Jackim bit him.

Officer Meadows was treated for his injuries at Deaconess Hospital. Another officer was also treated at Deaconess for a cut he sustained during the incident. Both Jackim and his wife were arrested at the store.[2]

At the police station, Jackim told Officer Meadows that he "fought" him because he did not

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[2] Nina Jackim was charged with resisting arrest and pled no contest to attempted disorderly conduct. She appealed her guilty plea, and we dismissed her appeal as moot. See *Brooklyn v. Jackim*, Cuyahoga App. No. 89659, 2008-Ohio-931.

think the officer had the authority to arrest him, that he had "military training," and if he had wanted to get "freed," he would have broken Meadows's nose and crushed his throat.

The jury convicted Jackim of both counts, and the trial court sentenced him to a 90-day suspended jail sentence, one year of community control, 400 hours of community service, anger management and a mental health assessment, and fines and court costs. The court further found that Jackim had already served his community control under his first case and ordered community control sanctions terminated.

Jackim appeals, raising five assignments of error for our review.

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Jury Instructions

In the first assignment of error, Jackim argues that the trial court committed plain error when it failed to properly instruct the jury, there was insufficient evidence to support Jackim's convictions, and the convictions were against the manifest weight of the evidence. First, we note that contrary to how Jackim has titled his first assignment of error, he does not argue that the evidence was insufficient to support his convictions or that his convictions were against the manifest weight of the evidence. Instead, the crux of Jackim's argument is that the trial court should have instructed the jury on disorderly conduct as it is defined in the Brooklyn Codified Ordinance 509.03, as opposed to state statutory law.

First, we note that Jackim did not request a jury instruction based on the municipal ordinance, nor object to the ordinance's omission in the final jury instructions. His failure to object to the jury instructions waives all but plain error. *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332, syllabus. Plain error "should be applied with utmost caution and should be invoked only to prevent a clear miscarriage of justice." Id. at 14. Plain error exists only where it is clear that the verdict would have been otherwise but for the error. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804.

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We find no error, plain or otherwise, with the jury instructions. The trial court instructed the jury on resisting arrest, in violation of R.C. 2921.33, the crime for which Jackim was charged and tried. Jackim was not charged with, nor tried for, a violation of the Brooklyn ordinance prohibiting disorderly conduct?[3]

Therefore, we overrule the first assignment of error.

Indictment

In his second assignment of error, Jackim argues that his indictment was defective. In his first trial, Jackim was convicted of assault on a police officer and resisting arrest. He argues on appeal that the trial court erred when it allowed

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[3] Jackim was originally charged in Brooklyn Municipal Court with disorderly conduct in violation of R.C. 2917.11; that charge was dismissed by the city prosecutor in 2003 before Jackim's case was bound over to common pleas court

the state to proceed on the assault charge in the second trial. Specifically, Jackim argues that he could not be tried for the crime of assault on a police officer because that charge was dismissed by the trial court in his first trial. We disagree.

Crim.R. 33(D) governs the procedure when a new trial is granted and provides: "[w]hen a new trial is * * * awarded on appeal, the accused shall stand trial upon the charge or charges of which he was convicted."

The record shows that the trial court dismissed the charge for assault on a police officer after the close of the state's case in the first trial. However, the

jury in the first trial found Jackim guilty of assault on a police officer as a lesser included offense of felonious assault. At the beginning of the second trial, the trial court amended the indictment to reflect the charges for which the jury convicted Jackim in the first trial; specifically, assault on a police officer and resisting arrest.

We see no error in the court's decision to follow Crim.R. 33(D) or in its amendment of the charge.

The second assignment of error is overruled.

Speedy Trial

In the third assignment of error, Jackim argues that his right to a speedy trial was violated.

R.C. 2945.71(C)(2) provides that a person against whom a felony charge is pending shall be brought to trial within 270 days after his arrest.

For purposes of computing time under R.C. 2945.71(C)(2), each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. See R.C. 2945.71(E). Consequently, "[al felony defendant in Ohio must be tried within ninety days if incarcerated on the pending charge or within two hundred seventy days if on bail." *State v. Coleman* (1989), 45 Ohio St.3d 298, 304, 544 N.E.2d 622. If the state violates a defendant's right to a speedy trial, then the court must dismiss the charges against the defendant. R.C. 2945.73(B).

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The speedy trial statute may be tolled by several events, set forth in R.C. 2945.72. For example, a defendant's demand for discovery or a bill of particulars tolls the speedy trial period. *State v. Brown,* 98 Ohio St.3d 121, 2002-Ohio-7040, *781 N.E.2d 159, ¶26.* The period is also tolled by "(t)he period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion[.]" R.C. 2945.72(H); *State v. Baker* (1993), 92 Ohio App.3d 516, 636 N.E.2d 363.

In general, the trial court should, but is not required to, identify the party against whom it will charge the continuance. *Cleveland v. Ali,* Cuyahoga App. No. 88604, 2007-Ohio-3902, ¶22-23. When a court continues a matter sua sponte, it must show, through its journal entry, that the continuance was "reasonable in light of its necessity or purpose," or the continuance should be charged against the state. Id. at ¶22.

Jackim argues that the time to bring him to trial expired three months before his first trial began. The state responds that this argument is barred by the doctrine of res judicata. We disagree with the state, but do find that Jackim's speedy trial time did not expire prior to the first trial.

First, it is important to note that Jackim's argument on appeal is not barred by res judicata. The state claims that Jackim did not raise the issue of speedy trial in *Jackim I.* We agree that Jackim did not properly argue his right

to a speedy trial in *Jackim I* in accordance with App.R. 16. That being said, he did raise the issue by reference under the first assignment of error.[4] We find that the reference is sufficient to preserve the argument. In addition, since we decided *Jackim I* solely on the basis of the court's granting the state's motion in limine and found all other assignments of error moot, Jackim's speedy trial claim is not now barred by res judicata.

When we review the time between Jackim's arrest and trial, including tolled periods, we find no violation of his statutory right to a speedy trial. Jackim was arrested on May 25, 2003. He was held in jail for one day, which counts as three speedy-trial days. His municipal court case was dismissed on June 3, 2003, and he was re-indicted on July 24, 2003. His arraignment was held on July 25. From July 25, 2003 until May 26, 2004, Jackim filed

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[4] When we dismissed Jackim's writ in State ex rel. Jackim v. Ambrose, Cuyahoga App. No. 90785, we noted that Jackim included a reference to the issue of speedy trial in his appellate brief in Jackim I, Id. at ¶2.

several motions and sought numerous continuances.

The trial court continued the matter sua sponte from June 24 to July 21, 2004. This continuance was reasonable under the circumstances, and was entered before the statutory trial period expired. See *State v. Holmes*, Cuyahoga App. No. 91948, 2009-Ohio-3736.

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Time was tolled from July 22, 2004 until August 3, 2004, and from September 23, 2004, to October 4, 2004, based on Jackim's requests for a continuance. Jackim waived his right to a speedy trial from August 4, 2004, to September 30, 2004.

The state concedes that speedy-trial days should be charged to the state from October 5, 2004 until February 9, 2005. Then, time was tolled from February 9 until March 1, 2005 because Jackim requested another continuance. Speedy-trial days are charged to the state from March 2, 2005 until June 14, 2005. The court was again unavailable from June 15, 2005 until July 15, 2005, and we again find the request reasonable. Jackim filed a motion to dismiss on July 15, 2005 that tolled the speedy-trial time until July 20, 2005, when trial commenced.

Considering all of these periods, we find that Jackim's trial took place before the statutory speedy trial period had elapsed. Thus, Jackim has not demonstrated a statutory speedy trial violation.

The third assignment of error is overruled.

Expert Testimony

In the fourth assignment of error, Jackim argues that the trial court erred in excluding portions of his expert's reports and testimony.

Evid. R. 702 governs expert witness testimony and states that a witness

may testify as an expert if all of the following apply:

"(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

"(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

"(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

"(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

"(2) The design of the procedure, test, or

experiment reliably implements the theory;

"(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result."

In this case, Jackim moved to qualify Bruce Bynum as a video expert. Prior to trial, Jackim filed a motion in limine asking the trial court to determine the admissibility of Bynum's testimony. In the motion, Jackim proposed that Bynum testify regarding: 1) how a specialized VCR works and how the videotape was analyzed, and how the resulting DVD and still photographs were produced; 2) the complexity involved in tampering with a "multiplexed" videotape; and 3) the ultimate issue of fact that Jackim's hands never went above his waistline during

the incident, which was "ascertained by analyzing the fields and frames from the multiplexed VHS tape."

During trial, the court issued an order allowing Bynum to testify as to the science of the store surveillance and recordings at issue but not allowing him to testify as to "any commentary as to body movements or actions by individuals appearing in the scenes."

While some states still recognize the rule prohibiting testimony as to the ultimate issues of a case, Ohio does not. *State v. Daws* (1994) 104 Ohio App.3d 448, 662 N.E.2d 805, citing, *McKay Machine Co. v. Rodman* (1967), 11 Ohio St.2d 77, 81-82, 228 N.E.2d 304. Evid. R. 704 states that

"[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact." Thus, testimony on an ultimate issue is not per se inadmissible in Ohio.

It is, however, within the discretion of the trial court to refuse to admit the testimony of an expert witness on an ultimate issue where such testimony is otherwise inadmissible under the Ohio Rules of Evidence, or when the testimony is not essential to the jury's understanding of the issue and the jury is capable of coming to a correct conclusion without it. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 148, 524 N.E.2d 881. See, also, Evid. R. 702 and 704; *State v. Stirnkorb*

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(1990), 63 Ohio App.3d 778, 580 N.E.2d 69; *McQueen v. Goldey* (1984), 20 Ohio App.3d 41, 47, 484 N.E.2d 712.

In order to be admitted at trial, expert testimony must (1) relate to scientific, technical, or other specialized knowledge; (2) assist the trier of fact to understand the evidence or to determine a fact in issue; (3) be relevant and material to an issue in the case; and (4) have a probative value that outweighs any prejudicial impact. Evid.R. 702, 402, and 403. See, also, *Daws,* supra.

First, we do not find that testimony from Bynum regarding his opinion on Meadows's and Jackim's body movements observed in the videotape "relate to scientific, technical, or other specialized knowledge."

Second, to establish that expert testimony wil1 assist the trier of fact, it must generally be

established that the subject of the testimony is outside the experience, knowledge, or comprehension of the trier of fact. *State v. Coulter* (1992), 75 Ohio App.3d 219, 228, 598 N.E.2d 1324, 1329; *Bostic* at 148-149. If the trier of fact can understand the issues and the evidence and arrive at a correct determination, expert testimony is unnecessary and inadmissible. *State v. Roquemore* (1993), 85 Ohio App.3d 448, 454-455, 620 N.E.2d 110, 114.

Jackim proposed that Bynum be allowed to testify regarding his observations of what was on the videotape, specifically that he observed: "Meadows in very immediate proximity looking down at Bruce's right hand.

Meadows's left arm is seen grabbing Bruce's right arm as Bruce's right hand is at Bruce's right rear pocket. I do not observe Bruce's right arm go about the vicinity of Bruce's waistband."

We find that the jury did not require any technical or specialized testimony by Jackim's expert to understand what was being shown on the videotape. The jury was able to view the videotape both during trial and deliberations. Nor is there any evidence that Bynum was an expert in body language or the investigation into what is seen on a videotape. Therefore, we find that the trial court did not err in excluding the testimony regarding body movements, and Jackim was not prejudiced by the omission of that portion of Bynum's proffered testimony.

The fourth assignment of error is overruled.

Hearsay

In the fifth and final assignment of error, Jackim argues that the trial court erred in excluding admissible hearsay testimony. Specifically, Jackim argues that defense witnesses should have been allowed to testify to what they heard Officer Meadows say during the incident at Sam's Club and during another incident in which Meadows arrested a customer at another store.

Evid. R. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the

truth of the matter asserted." A trial court is afforded a wide range of discretion to exclude or admit evidence and its ruling will not be disturbed on appeal absent an abuse of discretion that amounts to prejudicial error. *State v. Lundy* (1987), 41 Ohio App.3d 163, 535 N.E.2d 66; *State v. Graham* (1979), 58 Ohio St.2d 350, 390 N.E.2d 805.

Jackim argues that defense witness Michelle Williams, who Meadows had arrested in a prior incident at another store, should have been allowed to testify as to what Officer Meadows allegedly said to her because she was "present on the scene" and had "personal knowledge" of the officer's statements. He further claims that Nina Jackim should have been allowed to testify about what Officer Meadows said to her during the incident at Sam's Club.

Jackim offers no exception to the hearsay rule that would allow the testimony to come in. Not

only is it not this court's duty to make Jackim's arguments for him, our review of the record shows no exception that would have allowed the proffered statements into evidence. Thus, the trial court did not abuse its discretion in disallowing the statements into evidence.

Therefore, the fifth assignment of error is overruled.

Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

/s/LARRY A. JONES
LARRY A. JONES, JUDGE
COLLEEN CONWAY COONEY, A.J., and
MARY EILEEN KILBANE, J., CONCUR

APPENDIX D

Appendix E – Memorandum in Support of Jurisdiction of Appellant Bruce Jackim in the Ohio Supreme Court.
Dated: February 14, 2010 Filed: February 16, 2010

IN THE SUPREME COURT OF OHIO

BRUCE JACKIM APPELLANT, v. STATE OF OHIO APPELLEE.	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. 92617

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT BRUCE JACKIM

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Proposition of Law I:
The provisions of R.C. § 2945.72(D) will not toll speedy trial but will be charged against the State for any period of delay by the defense incited by either neglect or an improper act of the State.....3

Proposition of Law II:
When computing the triple-count provisions of R.C. § 2945.71 (E), the "day of arrest" or "date of arrest" of the accused does not represent a tolling event but has the same meaning as "the first day" as used in Criminal Rule 45(A) and R.C. § 1.14 6

Proposition of Law III:
The provisions of R.C. § 2945.72(H) toll speedy trial from the effective date of the continuance, if different from and occurring after the date of the proceeding 8

Proposition of Law IV:
Under the provisions of R.C. § 2921.33(A), a person may resist an unlawful arrest but not the unlawful arrest of another; however, that person shall be subject to being charged under Chapter 2903 of the Revised Code if excessive force is used to resist an unlawful arrest 11

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Journal Entry and Opinion of the Cuyahoga County Court of Appeals December 17, 2009 [Released]; January 8, 2010 [Journalized].....1

EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS ONE OF PUBLIC OR GREAT GENERAL INTEREST

The Defendant-Appellant, Mr. Bruce A. Jackim, seeks this Honorable Court's review of the decision rendered by the Eighth District Court of Appeals in *State v. Jackim,* 8th Dist. No. 96217, 2009-Ohio-6640.

The constitutional rights of an accused can be easily violated and avoid review by this Honorable Court when a lower court misinterprets or misapplies relatively minor details of the Revised Code, Criminal Rules or case law. The constitutional rights of the Appellant were violated using this method. This is a symptom of a weak legal system tainted by the appearance of impropriety and where indolence is pervasive. *State ex rel. Bruce A. Jackim v. Eighth District Court of Appeals, et al.,* 124 Ohio S.Ct.3d 1413, 2009-Ohio-6816, 919 N.E.2d 213, denied.

The substantial constitutional question in this case is whether the Ohio Supreme Court should permit its lower courts to deliberately use such methods to deny an accused of his constitutional rights. The public interest aspect of the within cause is illustrated by the decision of this Court in *Galatis,* wherein the Court stated:

> It does no violence to the legal doctrine *of stare decisis* to right that which is clearly wrong. *It serves no valid purpose to allow*

> *incorrect opinions to remain in the body of the law.* (Emphasis added) *Westfield Insurance Co. v. Galatis, et al.* (2003), 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256; quoting *State ex rel. Lake Cty. Bd. of Comms. v. Zupancic* (1991), 62 Ohio St.3d 297, 300, 581 N.E.2d 1086.

Further, there may be situations where it is the court's duty to see that an accused receives the protection of the higher constitutional authority. *State v. Ladd* (1978), 56 Ohio St.2d 197, 3 N.E.2d 579. The Appellant commends these legal propositions as controlling in the instant case, and that this is a situation requiring this Court's protection of an accused. Therefore, Appellant urges the Court to accept this case.

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STATEMENT OF THE CASE AND FACTS

The Appellant was arrested on May 25, 2003 and arraigned and made bond on May 27, 2003, the Tuesday after the Memorial Day weekend.[1] Two days in jail, with the triple count provision, accrues a total of six days. The Appellant appeared in Parma Municipal Court for preliminary hearing on June 2, 2003, where the case was dismissed *nolle prosequi.*[1] An additional six days expired, for a total of twelve days accrued during prior municipal proceedings. See *Proposition of Law II.*

The Appellant was indicted on July 11, 2003

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[1] The City of Brooklyn Prosecutor was not present in the courtroom

and arraigned at the Cuyahoga County Common Pleas Court on July 25, 2003; no prosecutor was present. Defense motions for discovery and a bill of particulars tolled speedy trial until August 7, 2003 when the prosecution responded. An additional twenty-eight days expired until September 4, 2003 when the defense was granted a continuance, bringing the total to forty days accrued.

Defense continuances tolled speedy trial until February 20, 2004. Another six days expired as of February 26, 2004, when the defense was granted a continuance. A total of forty-six days have now accrued.

Nineteen days expired from March 25, 2004 until April 13, 2004 -the trial date requested by the defense. Sixty-five days have now accrued. However, the prosecution has not responded to the defense's request for evidence. *See* *Proposition of Law I*. Defense continuances toll speedy trial until May 26, 2004.

Twenty-eight days expired before the trial court's continuance on June 23, 2004. A total of ninety-three days have accrued. Defense continuances and a date specific waiver toll speedy trial until October 5, 2004.

2

One hundred twenty-eight days expired as of February 9, 2005. A total of two hundred twenty days have now accrued. A defense continuance tolled speedy trial until March 1, 2005.

Fifty-days later, on April 20, 2005, a total of two hundred seventy days had expired.[2] On July

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[2] Without adding any days from *Proposition of Law I* or *Proposition of Law III*.

15, 2005 - day three hundred fifty-six - defense files the motion to dismiss.
Speedy trial was raised during *Jackim I* (denied by trial court), the *Jackim I* appeal (mooted by appellate court), *Jackim II* (denied by trial court), and the *Jackim II* appeal (denied).

Lastly, testimony by State's witnesses given at *Jackim I and Jackim II,* coupled with long-standing case law precedent, reveals that the arresting officer did not even have a basis for an investigative stop, much less probable cause for an arrest. However, the trial court judges did not fully incorporate or interpret case law to assist the juries in the triers of fact. *See* *Proposition of Law IV*. This led to the Appellant being twice convicted of resisting arrest and assault.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

***Proposition of Law I*. The provisions of R.C. 2945.72(D) will not toll speedy trial but will be charged against the State for any period of delay by the defense incited by either neglect or an improper act of the State.** [3]

R.C. 2945.72 identifies speedy trial tolling events that extend the time for hearing or trial, including defense motions and continuances. Further, R.C. 2945.72(D) tolls speedy trial for "Any period of delay occasioned by the neglect or improper act of the accused." R.C. 2945.72(D) [In pertinent part].

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[3] This basic premise if this proposition was argued and rejected by both the trial court and appellate court.

On the day of arraignment at the Cuyahoga County Common Pleas Court on July 25, 2003, defense counsel filed and served a Correspondence to William D. Mason, Cuyahoga

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County Prosecutor, requesting discovery and a bill of particulars.[4] The State filed responses thirteen days later on August 7, 2003. [5] The State's discovery response by Assistant County Prosecutor Therese McKenna listed videotape in evidence. On August 8, 2003, mistakenly believing that McKenna was assigned to the case, defense counsel corrected the Correspondence by filing a formal motion for discovery with a certificate of service on McKenna.[6]

Both the State and appellate court incorrectly identify the later defense motion for discovery as a separate and distinct defense motion for discovery instead of recognizing it as a *nunc pro tunc* correction.[7] The trial court's journal identifies

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[4] There correspondence was probably files because, according to the Appellant, there was no one at the State's table at arraignment – as at Parma Municipal Court. This is supported by the correspondence having been apparently files three hours after the arraignment.

[5] Although these were obviously filings by the State in the court's journal, the appearance docket identifies obvious State filings as being by the defense.

[6] Assistant County Prosecutor McKenna was actually assigned to the Grand Jury.

[7] Other examples errors in the outline appearance docket include the *Bill of Particulars, Response to Request for Discovery Under Rule 16, and Motion for Discovery by the State of Ohio*, which are also identified as defense motions. *See State, ex rel. Worchester v. Donnellon* (1990), 49 Ohio St. 3d 117, 551 N.E.2d 183. [All litigants have a clear legal right

the filing as such by stating "Motion for Discovery (Written Discovery Request was Previously Submitted) ***Proof of Service Filed.***" [Emphasis added].

At the defendant's request, trial was set for April 13, 2004. One week before the scheduled April 13, 2004 trial date, defense counsel filed its witness list, discovery response, and request for evidence. Defense counsel refiled the discovery motion filed on August 8, 2003 that formalized the July 25, 2003 correspondence. [Defense counsel refiled the duplicative motion assuming the failure to respond was because the assistant prosecutor could not locate the prosecutor's file as reflected in the appearance docket "Lentz no file."].

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The day before the scheduled trial, defense counsel filed a Correspondence, dated April 12, 2004, addressed to William D. Mason, Cuyahoga County Prosecutor.[8] Defense counsel hand delivered a copy of the Correspondence to the Office of the Cuyahoga County Prosecuting Attorney on the morning of April 13, 2004.

In the Correspondence, defense counsel complained that the assistant county prosecutor assigned to the case had not followed up on the offer to reach a fair and equitable resolution by

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to have the proceedings they are involved in correctly journalized].

[8] Date stamped by the Clerk on April 12, 2004 but journalized at 11:33 A.M. on April 13, 2004 making it appear that it was filed after the 10:00 A.M. trial instead of the day before the trial.

jointly viewing the merchant surveillance videotape.[9] The videotape was obtained on June 2, 2003 via a duly issued subpoena dated May 27, 2003 by the municipal court.[10]

Additionally, defense counsel complained that the original videotape listed in State's evidence had not been produced for viewing and was important because problems with the defense copy.

By the scheduled day of trial on April 13, 2004, the State still had not responded to the request for evidence or produced the videotape it had listed in its sole discovery response dated August 7, 2003. Defense counsel requested and was granted a trial continuance on April 13, 2004 and again on the rescheduled trial date of May 11, 2004. The State still did not respond.

By July 19, 2005, four hundred sixty-two days from the scheduled April 13, 2004 trial date, the State still had not responded to the request for evidence. However, the State did move to suppress the defense videotape with a *motion in limine* and misled both the trial court and

appellate court by asserting that incident was not on the videotape - after viewing a copy of the defense videotape on July 15, 2009, without defense

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[9] The final paragraph of the Correspondence dated April 12, 2004, notifies the Cuyahoga County Prosecutor, that the Appellant's version of the facts was that the off-duty officer, "started the altercation and actually assaulted" the Appellant at the customer service desk on May 25, 2003.

[10] *City of Brooklyn v. Bruce Jackim*, Parma Municipal Court, Case Nos. 03CRA01859 and 03CRB01861.

counsel, using the proper equipment, [11]

It is *res judicata,* and the State conceded, "it had a continuing duty to update discovery and failed to do so." The State failed to correct the initial discovery response that listed videotape in State's evidence and in so doing violated Criminal Rule 16. *See State v. Jackim,* 8th Dist. No. 87012, 87400, 2006-Ohio-4756. *[Jackim* I] referring to the State's sole discovery response dated August 7, 2003.

The Appellant contends that the provisions of R.C. 2945.72(D) should not toll speedy trial but be charged against the State for any periods of delay by the defense incited by either neglect or an improper act of the State.

If this proposition of law is adopted, the two duplicative defense discovery requests would not toll speedy trial and, **minimally,** the defense continuances of April 13, 2004 and May 11, 2004 - a total of sixty-five days - should be counted against the State instead of the defense. **Even using the State's incorrect speedy trial count,** this would mean that speedy trial expired on April 11, 2005. This is well before the June 15, 2005 date asserted by the State as day two hundred seventy. Based on the foregoing, the holding by the appellate court should be reversed and the charges dismissed pursuant to the provisions of R.C. 2945.73(B).

Proposition of Law II. **When computing the triple-count provisions of R.C. 2945.71(E), the**

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[11] A federal court ordered the tape viewed at the merchant store with the proper equipment, which revealed that the incident was on the videotape obtained by defense counsel.

"day of arrest" or "date of arrest" of the accused does not represent a tolling event but has the same meaning as "the first day" as used in Criminal Rule 45(A) and R.C. 1.14.

R.C. 2945.71(E) states that an accused gets triple count for "each day during which the accused is held in jail in lieu of bail on the pending charge." R.C. 2945.71(E) [In pertinent part].

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It is also well accepted that "the date of arrest is not counted and the last day of the period in question shall be counted." *State v. Steiner* (8th Dist. 1991), 71 Ohio App.3d 249, 250-251,593 N.E.2d 368. *See also State v. Lautenslager* (3rd Dist. 1996), 112 Ohio App.3d 108, 677 N.E.2d 1263.[12] The above interpretation has been routinely and explicitly applied by appellate court districts throughout the state and by this appellate court district from *Steiner* through *State v. Semenchuck*, 8th Dist. No. 90854, 2009-Ohio-465. *Steiner, supra.*

The trial court ignored well-established law, and by affirming, the appellate court reversed nineteen years of it own precedent, despite consistent opposition by the Appellant citing *Lautenslager* and its line of cases. *Lautenslager, supra.*

In this case, the State acknowledged that the Appellant was arrested over the Memorial Day weekend; that the date of arrest was Sunday, May

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[12] These two cases are also identified as relevant to R.C. 2945.71 on the Office of the Ohio Public Defender's website relating to time under Criminal Rule 45. (http://opd.ohio.gov/RC_Casebook/speedy_trial.htm).

23, 2003; that the Appellant was in jail on Monday, Memorial Day, May 24, 2003; and that the Appellant was arraigned and made bond on Tuesday, May 25, 2003.[13] However, the State applied the triple count provision of R.C. 2945.71 (E) to only one day instead of the two days that had elapsed from the date of arrest.

Although unsupported by case law, the State asserted that the phrase used in many speedy trial cases - "the day of arrest is not counted" - means that the date of arrest is excluded completely from the count and is a *de facto* tolling event. According to the State's interpretation, the day of arrest tolls speedy trial and the counting provisions of Criminal Rule 45(A) are not applied until the following day.

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The above creates the following difference in the speedy trial computations when compared to the Appellant's position, based on case law and Criminal Rule 45(A)./d:

	Case Law	State's Position
Date of Arrest		
May 25, 2003 Sunday	Day 0	Tolled
Memorial Day		
May 26, 2003 Monday	Day 1*	Day 0
Arraignment		
May 27, 2003 Tuesday	Day 2*	Day 1*

[13] This case shares a common litigation history with City of Brooklyn v. Jackim, Parma Municipal Court Cases 03CRA1859 and 03CRB1861. *See State v. MacDonald* (1976), 48 Ohio St.2d 66, 357 N.E.2d and *State v. Parsley* (1993), 82 Ohio App.3d 567, 571,612 N.E.2d 813; *State v. Parker* (2007), 113 Ohio St.3d 207, 2007-Ohio-1534, 863 N.E.2d 1032.

With Triple Count[4] 6 Days 3 Days

The appellate court not only adopted the State's position but also reversed its own long-standing precedent. Further, the appellate court's denial of the Appellant's *Motion to Certify a Conflict* makes it clear that this issue requires further clarification since it does not comport with Criminal Rule 45(A) or R.C. 1.14, and re-interprets case law relating to R.C. 2945.71(E).[14] This radical departure from the statutes is significant because the statutory speedy trial provisions set forth in R.C. 2945.71 are coextensive with state and federal constitutional speedy trial provisions. *See State v. King* (1994), 70 Ohio St. 3d 158, 161, 1994-Ohio 412,637 N.E.2d 903.[15]

Even using the State's incorrect speedy trial count, adopting this proposition of law would mean that speedy trial expired on June 12, 2005.[16] Therefore, this Court should affirm this proposition of law, reverse the holding by the appellate court, and dismiss the charges pursuant to the provisions of R.C. 2945.73(B).

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[14] The 5th Dist. Appellate Court also used the same counting scheme set forth in *State v. Robinson*, 5th Dist. No 2008 00283, 2009-Ohio 2981

[15] The Sixth and Fourteenth Amendments to the United States Constitution, as well as section 10, Article I, Ohio Constitution, guarantee a criminal defendant the right to a speedy trial by the state. *See also State v. O'Brien* (1987), 34 Ohio St. 3d 7, 8, 516 N.E.2d 718.

[16] *Jackim I*, Appellant's first state court trial- the subject matter of speedy trial- went forward on July 20, 2005 when the jury was impaneled.

Proposition of Law III. **The provisions of R.C. 2945.72(H) toll speedy trial from the effective date of the continuance, if different from and occurring after the date of the proceeding.**

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The Supreme Court expressed its willingness to permit legislative enactment of the right to a speedy trial as follows: "(t)he states, of course, are free to prescribe a reasonable period consistent with constitutional standards *"Ladd, supra,* citing *Barker v. Wingo* (1972), 407 U.S. 514, 523, 92 S.Ct. 2182, 2188. The rationale supporting the provisions of the speedy trial statutes was to prevent inexcusable delays caused by indolence within the judicial system. *Ladd,supra.* [Emphasis added]. This proposition will address how, as in the first proposition of law, indolence by the State and trial court denied the Appellant of his constitutional rights.

It is axiomatic that a court speaks through its journal. *Carter v. Johnson* (1978), 55 Ohio App.2d 157, 380 N.E.2d 758 [A judge speaks as the court only through the journal of the court]; *State ex tel. Marshall v. Glavas* (2003), 98 Ohio St.3d 297, 784 N.E.2d 97 [A court of record speaks only through its journal entries]; *see also State ex rel. Indus. Comm. v. Day* (1940), 136 Ohio St. 477, 26 N.E.2d 1014, syllabus, as cited in *State v. Benson* (1985), 29 Ohio App. 3d 321, 505 N.E.2d 987. It is also axiomatic that "the journal imports absolute verity and it can not be collaterally attacked." *State ex rel. Worchester v. Donnellon* (1990), 49 Ohio St.3d 117, 551 N.E.2d 183. The State, however,

collaterally attacked the trial court's journal.

In this case, speedy trial had been running prior to the May 25, 2005 pretrial. The journal entry from the proceeding reads as follows: "PRETRIAL HELD 05/25/2005. TRIAL SET FOR 07/06/2005 AT 10:00 AM." Since no tolling event under the provisions of R. C. 2945.72(H) has occurred, speedy trial continued to run.

The next journal entry is a *sua sponte* continuance by the trial court: "TRIAL SET FOR 07/06/2005. TRIAL CONTINUED TO 07/18/2005 AT 10:00 AM. AT THE REQUEST OF COURT. REASON FOR CONTINUANCE: UNAVAILABILITY OF COURT ON THAT DATE. PARTIES NOTIFIED." This entry in the trial court's journal has a June 15, 2005

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proceeding date. The plain language of this journal clearly indicates that the continuance is from July 7, 2005 until July 19, 2005. This means that speedy trial continues to run until July 7, 2005, whence the continuance would toll speedy trial under the provisions of R.C. 2945.72(H).[17]

However, the State collaterally attacks the journal when it contends that the continuance tolls speedy trial from June 15, 2005 - the date of the proceeding - not the period journalized by the trial court. The State's contention is based not on law but on the State's flawed speedy trial count, which indicates that June 15, 2005 was day two hundred and seventy.

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[17] It tolls speedy trial, unless the speedy trial statute has expired, as the Appellant Asserts.

The State had an obligation to keep track of speedy trial and should have advised the trial court at the May 25, 2005 pretrial of the impending expiration because the burden to timely try a defendant rests upon both the prosecution and trial court.[18] Further, the factors, which toll time, that are set forth in R.C. 2945.72 are strictly construed against the state. *State v. Singer* (1977), 50 Ohio St. 2d 103, 109, 362 N.E.2d 1216.

Upholding the State's position does not further the judicial enforcement of the speedy trial statutes but sets a precedent that permits the State to collaterally attack a trial court's journal entries - even when the language is plain and the meaning clear - in order to conceal its own indolence and deny the accused of his constitutional right to a speedy trial. *Ladd, supra.*

Upholding the State's position derogates the lower court's judicial autonomy and undermines its judicial preeminence. Such preeminence is necessitated by the court's obligation to consider all factors relevant to the preservation of constitutional guarantees. *Id.*

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Therefore, this Court must affirm this

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[18] The State's response to the Appellant's first speedy trial motion did not comport with Civ.R.7. Since the State's opposition captioned as "motion in opposition" attached the appearance docket, which did not include the prior municipal court proceedings; grounds in support providing case law or statute were required. This is significant since the trial judge calculated in *Jackim I* that nine (9) days remained on July 19, 2005, yet twelve (12) days had accrued in the prior municipal court proceedings.

proposition that the provisions of R.C. 2945.72(H) should toll speedy trial from the effective date of the continuance, if different from and occurring after the date of the proceeding.

In this case, speedy trial would run an additional nineteen days before being tolled by the *sua sponte* continuance. However, the *sua sponte* continuance would not invoke the tolling provisions of R.C. 2495.72(H) because, using the State's count, speedy trial expired on June 15, 2005.[19] Therefore, the holding by the appellate court should be reversed and the charges dismissed pursuant to the provisions of R.C. 2945.73(B).

Proposition of Law IV. **Under the provisions of R.C. 2921.33(A), a person may resist an unlawful arrest but not the unlawful arrest of another; however, that person shall be subject to being charged under Chapter 2903 of the Revised Code if excessive force is used to resist an unlawful arrest.**

The Appellant asserts plain error; therefore, the Appellate court is correct that, in the absence of plain error, "the failure to object to improprieties in jury instructions, as required by Criminal Rule 30, is a waiver of the issue on appeal." *State v. Underwood* (1983), 3 Ohio St.3d 12, 13,444 N.E.2d

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[19] Even if June 15, 2005 was day 270, the continuance expired on July 19, 2005 then continued by the court to July 20, 2005. Since the trial in *Jackim I* began on July 21, 2005 when the jury was impaneled, speedy trial would still have expired by one day; however, the trial court in *Jackim II* refused to correct the journal when it was directly attacked even though the trial transcript did not support the journal entry.

1332. [Emphasis added].

The Appellant asserts that the conviction of a person who committed no crime under the Revised Code, as interpreted by case law, is the very definition of a manifest miscarriage of justice, and that there were exceptional circumstances: the Appellant repeatedly attempted to move an indolent judicial system to accept case law standards.

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Therefore, the Appellant also concurs that the, "[n]otice of plain error under Crim. R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91,372 N.E.2d 804, paragraph three of the syllabus. [Emphasis added].

It is axiomatic that the jury is the trier of fact and the trial judge interprets the applicable law to be used by that jury. A determination must be made of whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148.

At issue is whether there was legally sufficient evidence to support a guilty verdict on Resisting Arrest - R.C. 2921.33(A)- where there was insufficient evidence to support that a reasonable officer would have probable cause to arrest the Appellant on the predicate offense of Disorderly Conduct - R.C. 2917.11(A)(2).

R.C. 2917.11(A)(2) has been interpreted by case law to require "fighting words." *Warren v. Patrone* (1991), 75 Ohio App.3d 595,600 N.E.2d

344; *State v. Wylie* (1984), 19 Ohio App.3d 180, 182, 482 N.E.2D 1301, 1304. *See also State v. Owens,* 10th Dist. 2004, 2004-Ohio-5159, citing *State v. Lamm* (1992), 80 Ohio App.3d 510, 513,609 N.E.2d 1286 ("a person may not be punished for speaking boisterous, rude or insulting words, even with the intent to annoy another, unless the words **by their very utterance inflict injury or are likely to provoke the average person to an immediate retaliatory breach of the peace.**") [Emphasis added]

At the time of the incident, the arresting officer was providing security guard services for a merchant within his jurisdiction as an off-duty officer. Further, the City of Brooklyn Codified Ordinance 509.03(a)(2) explicitly incorporates the above "fighting words" holding. Lastly, the arresting officer was responsible for knowing the Brooklyn Codified Ordinances and: In the

event of improper action... it will be presumed that the member was familiar with the law or policy in question." Rule 3.9, *Knowledge of Laws and Regulations,* Rules and Regulations Manual for the City of Brooklyn Police Department, approved August 1, 1976.

Therefore, the arresting officer knew that he had neither probable cause nor grounds for an arrest. So he arrested the Appellant on the same predicate charge under R.C. 2917.1 l(A)(2).[20]

During the course of the criminal trials -

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[20] The arresting officer was familiar with the City of Brooklyn Codified Ordinance because he arrested and charged the Appellant's wife, Nina Lynn, under the city ordinances only.

Jackim I and Jackim II- there was no testimony that the Appellant used fighting words at any time nor did the State assert such conduct. Further, no basis for a reasonable officer to make an investigative stop requiring the showing of a driver's license. *State v McCrone* (1989), 63 Ohio App.3d 831,835; 580 N.E.2d 468. Nonetheless, the Appellant was convicted twice for resisting arrest based on probable cause of disorderly conduct.

The holding in *State v. Hendren* bluntly states: "Appellant argued that it is never unlawful to resist an unlawful arrest. We agree. Under the plain language of R.C. 2921.33(A), a lawful arrest is an element of the crime." *See State v. Hendren* (1996), 110 Ohio App.3d 496, 674 N.E.2d 774; *see also Hoover v. Garfield Hts. Mun. Court* (C.A. 6, 1986), 802 F.2d 168, 174 [cert. denied 107 S.Ct. 1610]; *State v. Collins* (1993), 88 Ohio App. 3d 291,294-5,623 N.E.2d 1269.

Defense counsel in *Jackim II* moved to dismiss the charge of resisting arrest based on the above case law, the codified ordinance of the municipality, and testimony from *Jackim I*. The motion of the Appellant was unopposed by the State and there was no oral argument.[21] The trial court denied the motion two hundred seventy-two days later on the date set for trial. Clearly, the

trial judge would not have entertained, much less granted, modifications to the jury instructions relating to a charge of resisting arrest based on

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[21] A review of the trial court's journal reveals that the State rarely responded to defense motions unless ordered to by the trial court or a federal court

lack of probable cause for disorderly conduct.

The Appellant asserts that the trial court judge should have dismissed the charge of resisting arrest based upon a lack of probable cause for disorderly conduct. Instead, the trial court judge refused to make a probable cause determination when verbally requested during *Jackim I* and defense counsel argued at appellate oral argument that the matter of probable cause was an issue to be determined by the trial court judge and not the jury. The Appellant asserts that the jury would not have convicted on the resisting arrest charge had the jury instructions included the law relating to the "fighting words" requirement for the underlying charge. Further, a conviction for resisting arrest where case law holds that there is no probable cause to support the underlying charge is against the manifest weight of the evidence and should not have been accepted by the trial court judge.

The charge of resisting arrest based on the probable cause that the Appellant was disorderly was crucial to the State's assault case in *Jackim II*.[22] Without the resisting arrest charge, the State's case was weak since the actual infliction of officer's injury does not appear on the videotape. Also the small abrasion injury to the officer's arm allegedly occurred after the officer threw the Appellant into a wall, tossed him onto a counter, punched him in the face, pulled him off the counter, and pepper

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[22] Even without the merchant surveillance videotape, the jury in *Jackim I* acquitted the Appellant on the felonious assault charge with peace officer specification and found the Appellant guilty on the lesser-included offense of assault.

sprayed him before falling on top of him.[23]

Therefore, since the Appellant was resisting an unlawful arrest, there is a question of whether the assault charge was even viable. That is because emergency room medical records in

evidence in both *Jackim I* and *Jackim II* indicate that the injuries to the Appellant were evaluated as being far more severe than the arresting officer's abrasion.[24]

This proposition of law needs to be adopted to protect citizens from law enforcement officers who abuse the Revised Code to conceal their own bad acts in jurisdictions where they would not even have probable cause for an investigative stop much less an arrest.[25] It would also put trial court judges and prosecutors on notice that they are responsible for more than just the Revised Code but also the application of case law and relevant codified ordinances of the municipalities sending cases to the county for prosecution.

Therefore, this Court should adopt this proposition of law, reverse the convictions for resisting arrest and assault, and dismiss the charge

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[23] The trial judge and jury viewed this segment of videotape three (3) times during *Jackim II*.

[24] EMS testimony also identified the injury as a dime sized abrasion to the officer's left forearm.

[25] The prosecution in *Jackim II* was aware that the officer in this case has a history of bad acts including false arrest, being overly aggressive, and being dishonest while working off-duty. The prosecution in *Jackim II* was also aware that analysis of State' s witness testimony, 911 records, and the merchant surveillance videotape revealed that the arresting officer had lied under oath during *Jackim I*.

of resisting arrest.

CONCLUSION

For the reasons discussed above, this case involves matters of public interest and substantial constitutional questions. The Appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,
/s/ Catherine M. Brady

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CERTIFICATE OF SERVICE

I certify that a copy of this *Memorandum in Support of Jurisdiction* was sent by First Class U.S. mail to the following Counsel for Appellee on February 14, 2010:

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APPENDIX E